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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 375

GREAT AMERICAN INDEMNITY COMPANY, a corporation

and

JO-DEL RESTAURANT, INC., a corporation, *Petitioners*

v.

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

GREAT AMERICAN INDEMNITY COMPANY, a corporation

and

JO-DEL RESTAURANT, INC., a corporation, *Petitioners*

v.

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Great American Indemnity Company and Jo-Del Restaurant Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Reprinted as Appendices to this Petition, with the letter designations noted, are: (A) Opinion of District Judge Holtzoff of the United States District Court for the District of Columbia (reported at 186 F. Supp.

938); (B) Opinion of the United States Court of Appeals for the District of Columbia Circuit, reversing Judge Holtzoff's decision (reported at 290 F.2d 381) together with the dissenting opinion of Circuit Judge Bastian; (C) Order of the United States Court of Appeals for the District of Columbia denying petition for rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals was entered in the above entitled action on May 4, 1961. The Order Denying Petition for Rehearing was entered on June 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a workmen's compensation case, the technicalities of formal pleadings are required in framing issues before the Deputy Commissioner.

2. Whether, in a workmen's compensation case, issues of fact are sufficiently raised by the parties if they are submitted to the Deputy Commissioner in writing in advance of the hearing on forms prescribed by the Bureau of Employees' Compensation.

3. Whether a night club musician whose services are retained on a per diem basis is an employee or an independent contractor.

4. Whether, in a workmen's compensation case, an employee is engaged in the course of his employment while he is loitering on the employment premises for personal reasons after completing his employment duties.

STATUTE INVOLVED

The provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901, *et seq.*) as applied to employment in the District of Columbia (36 D.C. Code 501, 502), and which are pertinent to this case are as follows:

> Sec. 2. When used in this Act— . . .
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment . . .
>
> (11) "Death" as a basis for a right to compensation means only death resulting from an injury . . .
>
> Sec. 14. . . .
>
> (d) If the employer controverts the right to compensation he shall file with the deputy commissioner . . ., a notice, in accordance with a form prescribed by the commission [Bureau of Employees' Compensation] stating that the right to compensation is controverted, . . ., and the grounds upon which the right to compensation is controverted. . . .
>
> Sec. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. . . .

STATEMENT OF THE CASE

Fisher and Mainer were musicians at the Jo-Del Restaurant in the District of Columbia. On December 27, 1957 they completed their services for the evening at 1:30 o'clock a.m. and were paid off by the proprietor.

By that time the proprietor had discontinued all customer business and had locked his doors for the night. After being paid off Fisher and Mainer remained on the premises seated at the customers' side of the bar for purely personal reasons. Approximately one-half hour later two disgruntled customers returned to the restaurant, broke into the premises with the intention of committing an assault on the proprietor and, in a drunken orgy of gunfire, they killed Fisher and Mainer.

The dependents of the deceased filed claims for compensation under the District of Columbia Workmen's Compensation Law (Longshoremen's and Harbor Workers' Compensation Act). The employer and its insurance carrier (Petitioners herein) controverted the claims.

In their written Answers and Notices of controversion filed with the Bureau of Employees' Compensation on forms provided by the Bureau for such purpose (Exhibits "A", "B" and "C" to the Supplemental Appendix in the record below), the Petitioners raised the issues that (1) no employer-employee relationship existed between Jo-Del Restaurant Inc. and the alleged employees at the time of their injuries; (2) at the time of their injuries the employees were not performing services growing out of and incidental to their alleged employment; and (3) the deaths of the alleged employees did not result from accidental injuries arising out of or during the course of their employment.

Hearings on the claims were held by the Deputy Commissioner who thereafter made findings that the deceaseds were employees and that the injuries resulting in their death arose out of and during the course

of their employment. Accordingly, the Deputy Commissioner awarded compensation to the claimants.

Thereafter the Petitioners brought an action in the United States District Court for the District of Columbia seeking to set aside the awards. The Deputy Commissioner (Respondent herein) made a Motion for Summary Judgment on the ground that his findings as to the issues raised were supported by substantial evidence in the record and that the dependents were entitled to judgment as a matter of law. District Judge Holtzoff heard argument on the Motion and, on September 20, 1960, denied the Deputy Commissioner's Motion for Summary Judgment. Judge Holtzoff further directed the entry of judgment for Petitioners based upon a lengthy opinion in which he found that the deceased's injuries were not sustained during the course of their employment.

An appeal was thereupon taken by the Deputy Commissioner to the United States Court of Appeals for the District of Columbia Circuit. A panel of that Court consisting of three judges reversed the decision of the District Court, with one judge dissenting.

The majority opinion of the Court of Appeals held that the issue as to whether the homicides arose out of and in the course of employment had not been properly raised or presented by Petitioners before the Deputy Commissioner and therefore the District Court had no authority to hear and determine such issue.

In his dissenting opinion, Circuit Judge Bastian noted that such issue had been properly raised in the proceedings before the Deputy Commissioner, that testimony on this issue had been received, and that the issue was in fact resolved by a finding of the Deputy

Commissioner on the subject. Judge Bastian also noted that it was "unfortunate that in compensation cases such a strict view on the issues should be taken as appears in the majority opinion".

Petition for rehearing *en banc* was timely filed and denied by the Court of Appeals on June 5, 1961. Chief Judge Miller and Circuit Judge Bastian voted to grant the petition.

REASONS FOR GRANTING THE WRIT

I.

This case presents the important question of the degree of formality necessary to raise an issue in a workmen's compensation case as to whether an injury was sustained in the course of employment.

Section 23(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 923 (a)) provides that the Deputy Commissioner "shall not be bound by . . . technical or formal rules of procedure . . . but may make such investigation or inquiry or conduct hearings in such manner as to best ascertain the rights of the parties."

This statutory provision has been interpreted by this Court to mean that the Deputy Commissioner is not bound by such technical rules of evidence or procedure which would be applicable to trials in Court. See *Crowell* vs. *Benson*, 285 U.S. 22, at page 48. Despite the above statutory provision the Court of Appeals deliberately avoided the substantive issues involving the basic merits of the claims and instead ruled solely on the technicality that such issues had not been properly raised before the Deputy Commissioner. Clearly, this is contrary to the statutory requirement that the

"rights of the parties" be ascertained without regard to "technical or formal rules of procedure."

Unfortunately, the precedent established by the decision of the Court of Appeals, unless overruled, will affect all future workmen's compensation cases in such a manner so that the parties in order to be fully protected will have to resort to highly technical procedural steps not presently contemplated or required by the statute.

II.

The Court of Appeals further erred when it held that the "course of employment" issue had not in fact been raised in the proceedings before the Deputy Commissioner. Indeed, the dissenting opinion of Circuit Judge Bastian quotes from the employer's Answer and Notice to the Deputy Commissioner and from the Notice of Hearing itself to show that this issue was clearly raised in the proceedings before the Deputy Commissioner.

An unfortunate precedent is thus established by the Court of Appeals which will affect future workmen's compensation proceedings in that parties will not know whether issues raised by the pleadings on forms provided by the Bureau will in fact be heard or determined by the Deputy Commissioner. In the instant case the "course of employment" issue was clearly raised by the formal pleadings filed with the Deputy Commissioner on forms provided by the Bureau for such purpose. Nevertheless, the Court of Appeals ruled that such issue was not before the Deputy Commissioner to determine.

III.

The Court of Appeals further erred in ruling that the District Court improperly considered the "course of employment" issue, *sua sponte*.

Assuming that the issue had not been raised before the Deputy Commissioner with such strict formality as the majority opinion seems to think was necessary, it was nevertheless not improper for the District Court to raise such issue *sua sponte* when the record contained testimony on the issue and the Deputy Commissioner entered findings of fact with respect to such issue. Under such conditions it is not only proper but mandatory that the District Court take notice of such issue and determine whether the findings of fact are indeed supported by substantial evidence of record. Any other rule would make a mockery of the requirement that findings of fact must be supported by substantial evidence.

In reviewing the evidence taken before the Deputy Commissioner it was entirely proper for the District Court to consider any issue upon which there was evidence in the record in order to determine whether the Compensation Order was or was not entered in accordance with law. When considering the record as a whole, as it must be under *O'Leary* vs. *Brown-Pacific-Maxon*, 340 U.S. 504, the reviewing Court must determine whether all findings of fact are supported by substantial evidence, and if they are not so supported then such findings must be set aside. Indeed, where the finding of the Deputy Commissioner is *contrary* to the only evidence of record on the subject it would be grave error to affirm such finding on judicial review. In this connection it is again submitted that the statute requires an ascertainment of the rights of the parties and not a subservience to technical formalities.

IV.

The substantive issue in the instant case involves an important question of novel impression in this Court under the Longshoremen's and Harbor Workers' Compensation Act.

The very able opinion of District Judge Holtzoff below points out the weight of authority under workmen's compensation laws of various states to the effect that an employee who tarries on the employment premises for personal reasons after his work is done is no longer engaged in the course of his employment. Accordingly, Judge Holtzoff held that Fisher's and Mainer's injuries in the instant case were not sustained in the course of their employment.

This question arises frequently in the adjudication of workmen's compensation cases at the administrative level under the Longshoremen's Act and other related federal statutes. (District of Columbia Compensation Act, 36 D.C. Code 501, *et seq*, and Defense Bases Act, 42 U.S. Code 1651, *et seq.*).

A determination by this Court is necessary to establish an appropriate precedent for adjudication of all such cases in the future, particularly in view of the fact that conflicting views have been expressed below in this case on this legal question and that the Court of Appeals has avoided the issue entirely.

CONCLUSION

For all of the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August, 1961

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 3294-59

GREAT AMERICAN INDEMNITY CO., ET AL., PLAINTIFFS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES COMPENSATION, ET AL., DEFENDANTS

Opinion

Filed September 29, 1960. Harry M. Hull, Clerk.

Paul J. Sedgwick, of Washington, D. C., for the plaintiffs. Oliver Gasch, United States Attorney; John F. Doyle, Assistant United States Attorney; and Herbert P. Miller, Assistant Solicitor, United States Department of Labor; all of Washington, D. C., for the defendant Britton.

Mario S. Romero, of Washington, D. C., for the defendants Fisher and Mainer.

This is an action to review and set aside two awards under the Longshoremen's and Harbor Workers' Compensation Act, which constitutes the Workmen's Compensation Act for the District of Columbia.[1] The suit is brought by the insurance carrier and the employer, against the Deputy Commissioner of the Bureau of Employees Compensation and against the claimants to whom benefits had been awarded by him because of the death of two employees involved in this proceeding. The matter is now before the Court on a motion of the defendant Deputy Commissioner, for summary judgment.

The case is unusual. Were it not profoundly tragic it could be said to be bizarre. Bernard J. Mainer and Kenneth M. Fisher were musicians performing at a restaurant in downtown Washington, known as The Jo-Del Restau-

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[1] 33 U.S.C. 901 *et seq;* D.C. Code [1951 Ed.] 36:501.

rant. On the night of December 27, 1957, two intoxicated and disorderly patrons were ejected from the establishment. Later that night, after the musical entertainment had been completed, the musicians had been paid off, and the place was about to be closed, the two disgruntled customers returned, carrying firearms and commenced shooting inside the restaurant. They first shot one of the proprietors, who died instantly. Continued indiscriminate gunfire on their part resulted in the wounding of the two musicians. These wounds proved fatal. The Deputy Commissioner, after a series of protracted hearings, awarded compensation to Mainer's mother, and to Fisher's widow and children. The plaintiffs claim that no awards should have been made and seek to set them aside.

It is appalling to contemplate that such an uncivilized and barbaric episode could take place in the heart of this city in the middle of the Twentieth Century. The case has a strong humanitarian and sympathetic appeal especially as to Fisher's widow and children. On the other hand, one may well wonder whether it is within the philosophy of the Workmen's Compensation system that such a tragic event as occurred in this case should be within the insurance coverage, and whether it was contemplated that an employer should carry and pay for insurance against such remote and rare contingencies. One may reasonably question whether these murders may properly be regarded as an industrial accident. These enquiries, however, need not be pursued by this Court in the instant case, for the attack on the awards of the Deputy Commissioner is directed solely against his finding of fact, which, it is contended, are not supported by substantial evidence.

The principles governing judicial review in workmen's compensation cases are well established. They are so fundamental that they can be briefly and succinctly recapitulated without citation of authorities. The statute must be liberally construed and applied in favor of the workman.

The scope of judicial review is strictly limited. The statutory action[2] to set aside an award of compensation does not contemplate a trial *de novo*, but merely a judicial review of administrative action on the administrative record. The only questions that the Court may consider are, first, whether the award is contrary to law; and second, whether the administrative findings of fact are supported by substantial evidence. While substantial evidence means more than a scintilla of evidence, nevertheless the Court may not consider the weight of evidence, but is limited to determining merely whether there is substantial evidence in the record sustaining the findings of fact.[3] That countervailing evidence may have more probative value would not warrant the court in overruling the findings. So, too, the Court may not set aside the inferences drawn by the Administrator from the evidence that he chose to believe, if such inferences are reasonably possible and have a rational basis. Again, the Court may not review the credibility of witnesses, even if the record shows that the veracity of a witness has been impeached. Due regard must be accorded to the fact that the Court has only the cold, printed record before it, while the trier of the facts had the advantage of seeing and observing the witnesses. The Court may not substitute its own judgment for that of the Deputy Commissioner. Its function in these cases is no broader than that of the Court of Appeals in reviewin ga judgment of the District Court. Thus it is clear that the scope of judicial review in these cases is narrow and restricted.

In the amended complaint and in oral argument of counsel, the following objections against the Deputy Commissioner's findings of fact were advanced.

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[2] 33 U.S.C. § 921(b).

[3] At times it is said that there must be substantial evidence on the record "as a whole". The phrase "as a whole" is, however, tautological and superfluous, since manifestly the Court must consider the record as a whole in order to determine whether it contains substantial evidence supporting disputed findings of fact.

1. That the injuries were not sustained by the deceased in the course of employment, since the latter had completed their work and had been paid off about one-half hour before the shooting, but remained on the premises for their own purposes.

2. That there was no employer and employee relationship between the owner of the restaurant and the musicians, but that the latter were independent contractors.

3. That there is no substantial evidence sustaining the finding of the Deputy Commissioner as to the wage rate of the deceased.

4. That there is no substantial evidence sustaining the finding that Mainer's mother was dependent on him.

For the reasons about to be stated, the Court will overrule objections 2, 3, and 4, and sustain objection No. 1.

The hearings before the Deputy Commissioner were unduly protracted and the record is unnecessariiy voluminous due to the persistence of counsel in insisting on tendering much immaterial, irrelevant and incompetent matter. A close and intensive reading of the transcript of the evidence was required on the part of the Court in order to winnow the wheat from the chaff. The Deputy Commissioner made full and detailed findings of fact with painstaking care. The Court at this point will discuss the second, third and fourth objections, leaving the first objection until the last. The second objection was that no employer-employee relationship existed between the musicians and the owner of the restaurant, but that the musicians were independent contractors. The proof on this issue was conflicting. There was evidence, however, that each of the three musicians, who played or sang in the restaurant, was separately hired by the proprietor; that the owner exercised the function of hiring and discharging them; that each was individually paid by the proprietor a salary of $10.00 a night; and that each was required to perform during regular working hours

set by the proprietor. The Deputy Commissioner was justified on the basis of this evidence in finding that the musicians were employees of the restaurant. It was shown, on the other hand, that no deductions were made from the musicians' compensation for Social Security and income taxes, and further, that no premium for workmen's compensation insurance was paid in regard to them. Whether the Social Security Act and the withholding provisions are applicable involves different questions. That no insurance premiums were paid is a circumstance as compatible with the conclusion that the employer failed to comply with the law as it is with the contention that the musicians were independent contractors.

The evidence does indeed indicate that the musicians were in a sense temporary employees, as they and other similar workers in the entertainment field were in the habit of frequently changing their place of employment, sometimes every few months, sometimes every few weeks, and even every few days. No doubt this circumstance increases the employer's problem and burden in keeping appropriate records. Neither the Longshoremen's and Harbor Workers' Compensation Act nor the local statute making the Federal Act generally applicable in the District of Columbia, however, contains any provision excluding temporary or floating employees from the benefits of the insurance scheme. The District of Columbia law excepts any "employee engaged in any employment that is casual *and*[4] not in the usual course of the trade, business, occupation, or profession of the employer", D.C. Code [1951 Ed.] 36:502. Manifestly this provision is not applicable to the case at bar since music was furnished in the restaurant in the usual course of the employer's business.

The third objection is that there was no substantial evidence sustaining the finding of the Deputy Commissioner that the earnings of the deceased averaged $65.00 a week.

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[4] Emphasis supplied.

There is ample evidence, however, that each of the two musicians at the time of his death was receiving wages of $19.50 a day, for a five day week; that in addition he earned tips ranging from $3.00 to $6.00, or more, a day; and that previously he had earned $12.00 a day for a seven day week. Accordingly the Court is of the opinion that this finding of the Deputy Commissioner is sustained by substantial evidence.

The fourth objection is that there was no substantial evidence sustaining the finding that Mainer's mother was dependent on him. The evidence on this point is far from satisfactory. Much of it is indefinite, general, and hazy. Some of it is contradicted. Moreover, the testimony of Mainer's mother was seriously impeached on cross-examination. On the other hand, several witnesses corroborated her statement. Whether this testimony should be believed or rejected, whether so much of it as is favorable to the claimant should be credited and what weight should be attached to it, are questions for the trier of the facts and not for a reviewing tribunal. The fact remains that there is some testimony of substance, which, if believed, would tend to indicate that the deceased had been making considerable contributions to his mother which were of no mean assistance to her in her support.

We shall now revert to the first objection, namely, that there was no substantial evidence justifying the findings that the deceased were murdered in the course of their employment. The learned Deputy Commissionr made the following findings in respect to employee Mainer:

> That on the said day the employee herein while performing services for the employer as a musician, sustained personal injury when he was shot by gunmen, suffering wounds of the back, abdomen, right leg, right buttock, rupture of the spleen, contusion of the left kidney, tear of the posterior wall of the stomach, and damage to the spinal cord followed by paraplegia.

• • • • • • • • •

That on December 27, 1957, the employee and the other musicians, after entertaining the employer's guests, finished their work sometime between 1:30 and 2:00 a.m. and, as was the established custom, went to the bar where they regularly divided the money received from the guests as tips and where they were paid their wages; that, while waiting to receive their wages, the employee sustained injury as found above.

That the injury arose out of and in the course of the employment.

Similar findings were made in respect to employee Fisher. The evidence on this point is scanty. There were three musicians performing at the restaurant on the night in question. The third was Sherwood, who testified as follows (Tr. 551, 552, 553, 554, 555 and 556):

Q. You started out at 9:00 o'clock on Thursday night, and the shooting was at 2:00 o'clock or shortly thereafter on Friday morning?

A. Yes.

Q. That is what I am trying to determine. Now, were you paid for that night's stand in cash at about 1:30?

A. (Nodding affirmatively.)

The Deputy Commissioner. The answer is "yes."

The Witness. Yes.

By Mr. Sedgwick:

Q. Now, were you paid in cash?

A. Yes.

• • • • • • • • • •

Q. Did you see Fisher paid $10.00 that night?

A. Yes, sir.

• • • • • • • • • •

Q. Now, also talking about this 1:30 in the morning when you finished your playing, who paid B.J. his $10.00?

A. Mr. Kaldes.

• • • • • • • • • •

Q. Now, at the time—what was the closing hour of the restaurant? I mean, when they would lock the front door? 2:00 o'clock?

A. 2:00 o'clock, yes.

• • • • • • • • • •

Q. Now, at 1:30 when you stopped the music and—at what time was it that the fight first commenced to start when you thought there might be a little trouble?

A. About 1:00 o'clock.

Q. How long after you all had stopped playing was it that Overton and Carpenter went out?

A. We didn't stop playing until 1:30, and they was fighting around 1:00 o'clock.

• • • • • • • • • •

Q. But I mean, they left then, didn't they, before they came back with guns?

A. Yes.

Q. What I am trying to find out is *how long after you stopped playing music was it that they left to get guns, or for whatever reason?*[5]

A. *About half an hour.*

Q. That would be approximately 2:00 o'clock?

A. Yes.

Q. Then George Kaldes locked the place at 2:00 o'clock?

A. He started to, yes.

Q. That is when they came back? Shortly after that they came back in with guns?

A. Yes.

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[5] Emphasis supplied.

Q. Actually, George Kaldes had closed up for the night but had failed to lock the door, wasn't that what happened?

A. Yes, sir.

Q. How long after 2:00 o'clock would you say it was before the two men came back with guns?

A. About a minute after 2:00.

Q. And at that time where were you?

A. I was standing at the bar with B.J.

Q. And was B.J. at the bar also?

A. Yes.

Q. Was Fisher at the bar also?

A. No, he left and started walking down to the band-stand.

Q. Had he been at the bar before that?

A. Oh, yes.

Q. Now, when they came in, the two armed men, what did you do?

A. I moved behind the bar as soon as I seen the gun that the man Overton had.

* * * * * * * * *

Q. Now, at the time that B.J. was shot where was he?

A. Right in front on the other side of the bar.

Q. He was on the customers' side of the bar?

A. Yes, sitting on a stool.

Q. How many stools can the bar accommodate?

A. Oh, about ten.

Q. And prior to the time that you say Fisher had started to walk somewhere, was he also on a stool?

A. When they came in?

Q. Yes.

A. No, he had just got off the stool and started walking.

Q. Had Fisher also been on one of the stools alongside of B.J.?

A. Yes.

Q. And we are talking about the stools on the customer side as distinguished from where you were?

A. I was there too, and when they came in, Kenny had already started walking down to the bandstand, and when they came in I just walked around behind B.J. and stood at the end of the bar.

The foregoing testimony stands uncontradicted and seems unequivocally to lead to the conclusion that the two deceased musicians had completed their performance about 1:30 a.m., and were immediately paid off; that they sat around in the restaurant for their own personal purposes instead of immediately leaving their place of employment; and that the murderers came in about 2:00 a.m., and commenced shooting. Clearly, therefore, when they were shot, the deceased were not on the premises in the course of their employment. Their duties had terminated a half hour previously and they had been free to depart.

Under the circumstances, the Court is constrained to conclude that the finding of the Deputy Commissioner that the deceased were shot while they were being paid their wages, is not supported by substantial evidence. Similarly, the conclusion that the injuries were sustained in the course of employment likewise does not seem justified. On the contrary, under the circumstances the Court is of the opinion that the injuries were not sustained in the course of employment. In view of these considerations, there is no liability to pay workmen's compensation in these cases. This view is fully supported by the weight of authority. It is well established that while an employee must have reasonable time within which to leave the employer's premises after his duties are finished for the day, nevertheless, if for his own purpose he tarries for sometime after working hours, he is no longer in employment status under the Workmen's Compensation Act and any injury sustained during that period is not compensable. Thus in *National Biscuit Co.* v. *Litzky*, 6 Cir., 22 F. 2d 939, it was held that

injuries sustained by the employee while she lingered on the employer's premises after her work was terminated, in order to have lunch, were not covered by the Workmen's Compensation Act.

In *Congdon* v. *Klett*, 307 N.Y. 218, 120 N.E. 2d 796, the same principle was applied in the case of an employee who had completed his day's duties but remained on the employer's premises in order to take a swim in the employer's pool with the employer's permission. In this instance the hours of work ended at 5:00 p.m., and the injury was sustained about 5:30 p.m.

In *Urban* v. *Topping Brothers*, 184 (N.Y.) App. Div. 633, a clerk in a wholesale concern finished his work and went to look for companions with whom he usually went home and who were at that time elsewhere in the employer's premises. While doing so, he was injured. The Court held that at the time of the injury he was no longer engaged in the business of his employment and, consequently, his death, which resulted from the injury, was not compensable under the Workmen's Compensation Act.

In *Adams* v. *Uralde Asphalt Paving Co.*, 205 (N.Y.) App. Div. 784,200N.Y.Supp.886, the employee was laid off but remained in the employer's premises to eat lunch. After lunch but before leaving the premises he was injured. It was held that he was not in the course of his employment when he was hurt and that an award under the Workmen's Compensation law could not be sustained.

In *Fowler* v. *Texas Employers' Ins. Ass'n.* (Texas) 237 S.W. 2d 373, the plaintiff was a saleslady in a large department store working only part time. On the day of the accident her work ended at 3:00 p.m. Instead of leaving the store, however, she went to another department to purchase some articles for herself. This activity consumed about fifteen or twenty minutes. Then while she was preparing to leave, she was injured. It was held that there

could be no recovery under the Workmen's Compensation Act, because the injury was incurred after the termination of the employment for the day and subsequently to the time that would have been reasonably consumed in leaving the store.

It follows hence that the plaintiffs are entitled to summary judgment. While the plaintiffs have not filed any document entitled a motion or a cross-motion for summary judgment, the Court will treat the plaintiffs' written opposition to the defendants' motion, as a cross-motion. To do otherwise would unduly stress mere technicalities and create futile circumlocution.[6]

The defendants' motion for summary judgment is denied. The plaintiffs' motion for summary judgment is granted.

ALEXANDER HOLTZOFF
United States District Judge.

September 20, 1960.

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[6] *American Auto Ins. Co.* v. *Indemnity Ins. Co.* (E.D. Pa.) 108 F. Supp. 221, 224; *Farmers' Insurance Exchange* v. *Allstate Ins. Co.* (E.D. Md.) 143 F. Supp. 213, 215; *United States* v. *Closs*, 150 F. Supp. 687, 692, aff'd. (3d Cir.) 254 F. 2d 590.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees Compensation, U. S. Department of Labor,
Appellant

v.

GREAT AMERICAN INDEMNITY COMPANY, a corporation, and JO-DEL RESTAURANT, INC., *a corporation*, *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided May 4, 1961

Mr. Herbert P. Miller, Assistant Solicitor, Department of Labor, with whom *Messrs. Oliver Gasch*, United States Attorney at the time of argument, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellant.

Mr. Paul J. Sedgwick for appellees.

Before BAZELON, FAHY and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* An employer and its insurance carrier brought this suit against the Deputy Commissioner to set aside a compensation order directing payment of benefits to the dependents of two musicians fatally wounded by two disgruntled customers, who returned to the employer's premises after having been ejected. The amended complaint challenged only three of the defendant's findings: (1) that the deceased persons were employees and not independent contractors, (2) that the mother of

one of the deceased was a dependent, and (3) that the award is based upon a properly determined wage rate.

These findings were sustained by the District Court at the hearing on defendant's motion for summary judgment. However, the court, sua sponte, noted an additional finding which it set aside—namely, that the homicides arose out of and in the course of employment. The defendant strenuously objected to this action on the ground that the issue was not urged either in the administrative proceeding or in the present complaint. In overruling this objection, the court stated that it would consider any issue upon which "there is evidence in the record." The court thereupon treated plaintiffs' memorandum in opposition to defendant's motion for summary judgment as a cross motion, and granted summary judgment in favor of plaintiffs. This appeal followed.

We agree with the District Court that the record supports the findings of the Deputy Commissioner challenged in the complaint. But we think that the court erred in considering the issue which it raised, sua sponte.

In the formal pleadings and pre-hearing procedures before the Deputy Commissioner, the employer and its carrier denied, *inter alia*, the allegation that the homicides arose out of and in the course of employment. But at the hearing, in response to the Deputy Commissioner's effort to fix the issues for contest, counsel specifically limited its denials to the allegations of employer-employee relationship, wages and dependency.[1] Thus the claimants were

---

[1] With respect to the issues in controversy on one of the claims herein, counsel for the insured and its carrier stated to the Deputy Commissioner that

> "There was no relationship of employer-employee before or at the time of the occurrence. We controvert the claim for earnings; we controvert the dependency claim of the mother; and we are controverting until shown any evidence, any medical expenses.
>
> "Basically, without specifying it, we are resisting the claim in every particular except such particulars as we will later stipulate to, but generally, it is the contention of the respondents that there was no relation-

entitled to believe, as the Deputy Commissioner asserts they did, that the employer and its carrier had withdrawn their denial of the allegation now in question. The District Court read some of the evidence thereafter adduced at the hearing as disproving that allegation. It may not be assumed, however, that the claimants would have been unable to present countervailing evidence even if they had not been led to believe that the issues had been withdrawn. *Maryland Casualty Co.* v. *Cardillo*, 71 App. D.C. 160, 107 F.2d 959 (1939); *Metropolitan Casualty Ins. Co.* v. *Hoage*, 67 App. D.C. 54, 89 F.2d 798 (1937).

In concluding that the employer and its carrier withdrew their pre-hearing denial of the allegation that the homicides arose out of and in the course of employment, we are fortified by the failure of their complaint herein to challenge the action of the Deputy Commissioner in sustaining that allegation.

Reversed and remanded for further proceedings in accordance with this opinion.

BASTIAN, *Circuit Judge*, dissenting: I would affirm the judgment of the District Court on the very able opinion of Judge Holtzoff.[1] I think I should add that, in my opinion, it is quite clear that the issue as to whether the homicides arose out of and in the course of employment

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ship of employer-employee at all insofar as the management of the Jo-Del Restaurant and the musicians were concerned and, of course, basically the dependency of the mother. . . ."

With respect to the other claim, counsel subsequently stated:

"The overall grounds of the controversy are that there was no employer-employee relationship. Specifically, we deny that relationship and we deny the claimed earnings. That is the extent of our denials in that case."

Read as a whole, it is abundantly clear that at the hearing before the Deputy Commissioner counsel did not contest the allegation that the homicides arose out of and in the course of employment.

[1] 186 F. Supp. 938 (1960).

was before the Deputy Commissioner and, as well, before the District Court.

In the answer of the employer to the employees' claim for compensation, the following appears:

> "4. It is denied that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment."

In the Notice to the Deputy Commissioner that Claim Will be Controverted, the following appears:

> "Claimant's death not as a result of accidental injury or disease arising out of or during the course of his employment for the above-named employer."

In the Notice of Hearing, it appears that the hearing was set "for consideration of: Injury arising out of and in the course of employment [and other defenses not here important]."

When the case came before him, the Deputy Commissioner asked appellees' counsel: "What are the grounds of controversion?" Counsel replied:

> "Basically, without specifying it, we are resisting the claim in every particular, except such particulars as we will later stipulate to, but generally, it is to contention of the respondents that there was no relationship of employer-employee at all insofar as the management of the Jo-Del Restaurant and the musicians were concerned and, of course, basically the dependency of the mother."

Throughout the hearings before the Deputy Commissioner, testimony *pro* and *con* was received pertinent to the seriously disputed issue (among others) as to whether the homicides arose out of and in the course of employment; and that issue was in fact resolved by the finding of the

Deputy Commissioner. I can not agree that it is "abundantly clear that at the hearing before the Deputy Commissioner counsel did not contest the allegation that the homicides arose out of and in the course of the employment."

In the amended complaint, which is commented on by the majority, appellees, after setting forth certain specific objections, alleged as follows:

> "9. The Transcript of testimony, evidence and proceedings before said Deputy Commissioner, by this reference, are made a part hereof and are incorporated herein.
>
> "10. That the Findings and Awards of said Deputy Commissioner are not in accordance with law, but are arbitrary, capricious and founded upon irresponsible statements not competent evidence, conjecture and speculation, and said Awards are without substantial evidence to support the same."

One of the Deputy Commissioner's specific findings was "[t]hat the injury arose out of and in the course of the employment."

I think it unfortunate that in compensation cases such a strict view of the issues should be taken as appears in the majority opinion.

For the above reasons, I would affirm the judgment of the District Court.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 16,120

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees Compensation, U.S. Department of Labor,
Appellant,

v.

GREAT AMERICAN INDEMNITY COMPANY, a corporation, and JO-DEL RESTAURANT, INC., a corporation, *Appellees.*

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of the appellees' petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: June 5, 1961.

Chief Judge Miller and Circuit Judge Bastian would grant the petition.

SUPREME COURT. U. S.

Office-Supreme Court. U.S.
FILED
OCT 2 1961
JAMES R. BROWNING, Clerk

No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1961

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, AND JO-DEL RESTAURANT, INC., A CORPORATION, PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 290 F. 2d 381. The opinion of the District Court for the District of Columbia is reported at 186 F. Supp. 938.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1961. A petition for rehearing was denied on June 5, 1961. The petition for a writ of certiorari was filed on August 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court, in reviewing an administrative award of workmen's compensation benefits, properly set aside the award on a ground it raised *sua sponte*, *i.e.*, whether the deaths in question had arisen out of and in the course of the workers' employment.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, made applicable here by the District of Columbia Workmen's Compensation Law (see footnote 2, *infra*), provides in pertinent part:

> 33 U.S.C. 902. Definitions.
>
> When used in this chapter—
>
> * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> * * * * *
>
> 33 U.S.C. 920.
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.
>
> * * * * *

STATEMENT

Petitioners—an employer and its insurance carrier—brought this action in the district court against the Deputy Commissioner to set aside an award of compensation benefits to the dependents of two musicians killed by two disgruntled customers, who had returned to the employer's restaurant after having been ejected (J.A. 54).[1] The pertinent facts may be summarized as follows:

At approximately 2:00 A.M. on December 27, 1957, Bernard J. Mainer and Kenneth H. Fisher, musicians at the Jo-Del Restaurant in the District of Columbia, were fatally shot by two disgruntled customers (J.A. 55). The dependents of the deceased, the mother of Mainer and the widow and children of Fisher, filed claims for compensation under the District of Columbia Workmen's Compensation law.[2]

At the hearing before the Deputy Commissioner, the petitioners raised only the following issues:

As to the Mainer claim: "Employer-employee relationship,[3] wages and dependency" of the claimant's mother (J.A. 65).

---

[1] "J.A.—" refers to the joint appendix attached to the Deputy Commissioner's brief in the Court of Appeals.

[2] The District of Columbia Workmen's Compensation law (D.C. Code (1951 Ed.) 36:501) makes applicable to employment in the District the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. 901, *et seq.*; see Pet. App. 1a.

[3] The petitioners had contended that Mainer and Fisher were independent contractors and hence that there was no employment relationship between them and Jo-Del Restaurant, Inc.

As to the Fisher claim: "Employer-employee relationship and wages" (J.A. 65–66).

On each of the issues submitted for his consideration, the Deputy Commissioner, after the taking of extensive evidence (approximately 800 pages), found for the claimants and awarded compensation accordingly (J.A. 18–29).

Thereafter, the petitioners instituted the present action in the district court to have the awards set aside (J.A. 14). In their amended complaint they raised only the same three issues they had raised before the Deputy Commissioner (J.A. 3, 16). The Deputy Commissioner moved for summary judgment upon the ground that the findings as to these three issues were supported by substantial evidence in the record (J.A. 30). The district court agreed and sustained these three findings (J.A. 57). However, as the court below put it, "the court, sua sponte, noted an additional finding which it set aside—namely, that the homicides arose out of and in the course of employment" (Pet. 14a). On that basis, the court denied the Deputy Commissioner's motion and directed judgment for the petitioners (J.A. 57, 64).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, noting that the issues as to "course of employment" had not been presented to the Deputy Commissioner or to the district court (Pet. 14a). The Court of Appeals further noted that there was no showing "that the claimants would have been unable to present countervailing evidence" on the "course of employment" issue, had they known that evidence on that issue was called for (Pet. 15a). Judge

Bastian dissented. (Pet. 15a). A petition for rehearing was denied *en banc* by the court of appeals, with Chief Judge Miller and Judge Bastian dissenting (Pet. 18a).

ARGUMENT

1. Petitioners seem to concede, as they must, that an issue not raised before the administrative agency cannot be seized upon for the first time in the reviewing court as a basis for upsetting the administrative determination. *E.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414. Considerations of fairness and of orderly procedure require the parties to come to issue in the forum vested with authority—the Deputy Commissioner in this case—to decide questions of fact. As noted by the court below, this is essential in order to enable the parties to offer all the evidence they believe relevant to the issue which the trier of fact is designated to decide. It is equally essential in order to make certain that the litigants will not be surprised on appeal by a decision there of issues as to which they had no opportunity to introduce evidence. These considerations apply with particular force to workmen's compensation proceedings. The courts have, accordingly, consistently held that, upon judicial review of a compensation award, an issue will be considered as having been waived, and will not be heard by the reviewing court, unless the record shows that it was raised before the Deputy Commissioner. ***Mary-***

land Casualty Co. v. *Cardillo,* 107 F. 2d 959 (C.A.D.C.); *Metropolitan Casualty Ins. Co.* v. *Hoage,* 89 F. 2d 798 (C.A.D.C.); see *Moore Dry Dock Co.* v. *Pillsbury,* 169 F. 2d 988 (C.A. 9); *Bethlehem Steel Co.* v. *Parker,* 163 F. 2d 334 (C.A. 4); *Southern Shipping Co.* v. *Lawson,* 5 F. Supp. 321 (S.D. Fla); *Liberty Stevedoring Co.* v. *Cardillo,* 18 F. Supp. 729 (E.D.N.Y.); *Grain Handling Co., Inc.* v. *McManigal,* 23 F. Supp. 748 (W.D.N.Y.).

2. In seeking to avoid the impact of these settled principles, petitioners assert that the "course of employment" issue was in fact raised and pressed before the Deputy Commissioner. Even if there were record support for this assertion, this factual question is obviously not one warranting further review and evaluation here. In any event, as shown by the opinion below, the record refutes the assertion. It may be, as the dissent below suggests (Pet. App. 16a), that petitioners' initial pleadings in the administrative proceeding did sufficiently present this question, but it is plain that, if once raised, the issue was definitely abandoned in the course of the hearing. As noted in the majority opinion of the Court of Appeals, in direct "response to the Deputy Commissioner's effort to fix the issues for contest, counsel [for the petitioners] specifically limited its denials to the allegations of employer-employee relationships, wages and dependency. Thus the claimants were entitled to believe, as the Deputy Commissioner asserts they did, that the employee and its carrier had withdrawn their denial of the ['course of employment'] allegation now in question" (Pet. 14a–15a). See J.A. 65–66.

Moreover, the fact that this issue was not pressed before the Deputy Commissioner is confirmed by petitioners' complaint, filed in the district court in an attempt to set aside the Deputy Commissioner's award, which does not "challenge the action of the Deputy Commissioner" in finding that the deaths arose in the course of employment (Pet. 15a).

3. While the issue of "course of employment" was not open on judicial review, we think it appropriate to note that, in our view, the present record supports the conclusion that the deaths involved here arose out of and in the course of employment within the meaning of 33 U.S.C. 902(2).

An injury which occurs on the industrial premises, as did those here, is generally presumed to arise out of the employment. *The Travelers Ins. Co.* v. *Cardillo,* 140 F. 2d 10 (C.A.D.C.); *Smoot Sand and Gravel Corporation* v. *Britton,* 152 F. 2d 17 (C.A.D.C.); *Scott* v. *Hoage,* 73 F. 2d 114 (C.A.D.C.). Petitioners' contrary and restrictive view of the Compensation Act's coverage ignores the frequently-restated need for according a liberal interpretation to the Act in order to insure effectuation of its purposes. In rejecting a similarly restrictive view, this Court used language especially pertinent to the facts of this case (*O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 506–507):

> * * * We think this is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 481; *Matter of Waters* v. *Taylor Co.,* 218 N.Y. 248,

> 251, 112 N.E. 727, 728. The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. *Thom* v. *Sinclair,* [1917], A.C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. * * *

In this case, it can hardly be doubted that it was their employment that put the employees in the "zone of special danger" out of which their deaths arose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

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